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**Datasheet for the decision
of 21 February 2020**

Case Number: T 2255/16 - 3.3.10

Application Number: 07824940.6

Publication Number: 2099410

IPC: A61K8/02, A61K8/14, A61K8/55,
A61K8/97, A61Q19/00, A61K9/107,
G01N33/68, A61K47/48

Language of the proceedings: EN

Title of invention:
COMPOSITIONS COMPRISING MACROMOLECULAR ASSEMBLIES OF LIPID AND
SURFACTANT

Applicant:
Malvern Cosmeceutics Limited

Headword:
COMPOSITIONS COMPRISING MACROMOLECULAR ASSEMBLIES / MALVERN
COSMECEUTICS

Relevant legal provisions:
EPC Art. 54, 123(2), 111(1)

Keyword:

Novelty - (yes)

Amendments - added subject-matter (no)

Appeal decision - remittal to the department of first instance
(yes)

Decisions cited:

Catchword:



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Chambres de recours

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Case Number: T 2255/16 - 3.3.10

D E C I S I O N
of Technical Board of Appeal 3.3.10
of 21 February 2020

Appellant: Malvern Cosmeceutics Limited
(Applicant) Malvern Hills Science Park
Geraldine Road
Malvern, Worcestershire WR14 3SZ (GB)

Representative: Goodall, Scott
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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 4 May 2016
refusing European patent application No.
07824940.6 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman P. Gryczka
Members: J.-C. Schmid
F. Blumer

Summary of Facts and Submissions

- I. The appeal lies from the decision of the Examining Division refusing European patent application No. 07 824 940.6.
- II. The grounds for the refusal of the application by the Examining Division were that the claims of the then pending main and auxiliary requests 1 to 10 contravened the requirement of Article 123(2) EPC and that the subject-matter of claim 1 of the main and auxiliary requests 2 to 5 and 7 lacked novelty over document (11). Some requests were objected under Article 82 and 84 EPC.
- III. With the statement setting out the grounds of appeal, dated 5 September 2016, the Appellant filed a main request, as well as first to fourth auxiliary requests, superseding all former requests pending before the examining division.
- IV. In reply to a communication of the board dated 3 July 2019 accompanying summons to oral proceedings to be held on 11 February 2020, the appellant filed with a letter dated 14 January 2020 a fresh main request and fresh first to fourth auxiliary requests, replacing the previous requests.
- V. With a letter dated 10 February 2020, the appellant withdrew the main request, the first auxiliary request becoming the new main request. It did not uphold its request for oral proceeding if the case was remitted to the examining division for further prosecution.
- VI. On 10 February 2020, the oral proceedings were cancelled.

VII. Claim 1 of the main request reads as follows:

"1. A formulation comprising a composition which is in the form of an aqueous solution and a cosmetic or pharmaceutical agent, wherein the composition comprises phospholipid and surfactant, characterised in that the surfactant is polysorbate 20 and in that the phospholipid and surfactant are in the form of macromolecular assemblies of less than 75 nm in diameter, wherein the ratio of the surfactant to the phospholipid is 1:1 to 10:1 on a weight basis and the aqueous solution contains less than 0.25% ethanol by weight."

VIII. The Appellant requests that the decision of the Examining Division be set aside and that a patent be granted on the basis of the claims filed as the first auxiliary request with the letter dated 14 January 2020 (main request), or subsidiarily, on the basis of the second to fourth auxiliary requests filed with the letter dated 14 January 2020.

Reasons for the Decision

1. The appeal is admissible.

Main request: claims 1 to 4 filed as first auxiliary request

2. *Amendments*

Claim 1 of the main request is based on originally filed claims 4, 27 to 29, 74, 76 to 78, 82 and 92. The active agent has been specified as being a cosmetic or a pharmaceutical agent according to page 35, line 19 to 22 of the application as filed. Furthermore, the

feature "lipid" has been limited to "phospholipid" according to page 25, line 20 of the application as filed.

The feature that the aqueous solution contains less than 0.25% ethanol by weight is based on page 50, line 20 to 24 of the application as filed.

According to the examining division the ratio of the surfactant to the lipid from 1:1 to 10:1 did not apply to a particular lipid, but to the whole lipid content. The scope of the claims was therefore broadened by the limitation of lipid to phospholipid, since the compositions was defined by comprising and thus could contain lipids other than phospholipids, thus exceeding the ratio defined in the originally filed claims, contrary to the provision of Article 123(2) EPC.

However, the issue covered by Article 123(2) EPC is whether the amendment results in subject-matter which extends beyond the content of the application as filed and not whether the scope of the claims has been shifted by the amendment, which issue is covered by Article 123(3) EPC.

Claims 78 and 82 of the application as filed define a ratio of surfactant to lipid from 1:1 to 10:1 on a weight basis. Furthermore, these claims do not specify this ratio apply to whole content of the lipids present in the composition, but apply to lipid.

The application as filed furthermore discloses that the lipid may be selected from phospholipids (see page 25, line 19 to 21), which when combined with the ratio disclosed in claims 78 and 82, provides a clear and

unambiguous support for the feature relating to a ratio of surfactant to phospholipid from 1:1 to 10:1.

Dependent claims 2 to 4 are backed up by claims 117, 126 and 149 of the application as filed.

3. Hence, the Board comes to the conclusion that claims 1 to 4 of the main request comply with the requirements of Article 123(2) EPC.

4. *Novelty over document (11)*

The formulation disclosed in table on page 11 comprises 0,625% ethanol by weight, whereas claim 1 requires less than 0.25% by weight. In addition, the polysorbate 20:phospholipid (lipoid S100) weight ratio of the composition in document (11) is 1.750:0.063 (28:1), which is outside the claimed ratio of 1:1 to 10:1.

Accordingly, the subject-matter of claim 1 is novel over the disclosure of document (11).

5. The objections in the decision under appeal under Articles 82 and 84 EPC do not apply for the claims of the main request. Accordingly, the main request overcomes the objections raised in the decision under appeal. However, the decision under appeal was solely based on the failure of the claims of the then pending requests to fulfil the requirements of novelty over document (11) (Article 54 EPC), unity of invention (Article 82 EPC), clarity (Article 84 EPC) and/or to comply with the requirement of Article 123(2) EPC. The examining division has, however, not yet ruled on inventive step.

Therefore, the Board considers it appropriate to remit the case to the examining division for further prosecution.

Order

For these reasons it is decided that:

1. The appeal under appeal is set aside.
2. The case is remitted to the examining division for further prosecution.

The Registrar:

The Chairman:



C. Rodríguez Rodríguez

P. Gryczka

Decision electronically authenticated